

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

IN RE:

TRACIE M. STANTON

CASE NO. 03-66649

Debtor

Chapter 13

APPEARANCES:

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Hon. Stephen D. Gerling, Chief U.S. Bankruptcy Judge

**MEMORANDUM-DECISION, FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER**

Under consideration by the Court is the chapter 13 plan filed by Tracie M. Stanton (“Debtor”) on October 2, 2003. An objection to the confirmation of the Debtor’s plan was filed on behalf of State Farm Bank (the “Bank”) on November 20, 2003. The confirmation hearing

originally scheduled to be held on November 25, 2003, was adjourned to December 23, 2003, and ultimately held on January 27, 2004, in Utica, New York.

Following oral argument on January 27, 2004, the Court indicated that it would schedule an evidentiary hearing on the issue of valuation of the Debtor's real property located at 2032 Route 31, Canastota, New York (the "Subject Premises"). The evidentiary hearing, initially scheduled to be held on April 19, 2004, was adjourned several times on consent of the parties. On November 17, 2004, the Court heard testimony from the Debtor, as well as two appraisers.

Following the evidentiary hearing, the Court provided both parties with an opportunity to file post-hearing briefs by December 15, 2004. At the request of the parties, this deadline was extended until January 14, 2005, with the understanding that the parties were attempting to negotiate a settlement of the matter. The Court took the matter under submission on January 14, 2005.¹

JURISDICTIONAL STATEMENT

The Court has core jurisdiction over the parties and subject matter of this adversary proceeding pursuant to 28 U.S.C. §§ 1334, 157(a), (b)(1) and (b)(2)(B), (K), and (O).

¹ In a letter to the Court, dated January 20, 2005, Debtor's counsel requested a further extension for the submission of a post-hearing brief, to which the Bank's counsel objected. Because Debtor's counsel's request was made after the deadline set for the filing of briefs and because it is the Court's practice to accept briefs from the parties simultaneously on the date set for their submission, rather than to accept them sequentially on different days, the Court will not consider the brief filed by the Debtor on January 25, 2005.

FACTS

The Debtor filed a voluntary petition (“Petition”) pursuant to chapter 13 of the U.S. Bankruptcy Code, 11 U.S.C. §§ 101-1330 (“Code”) on October 2, 2003. According to Schedule A of the Debtor’s petition, the Subject Premises had a market value of \$65,000 as of the petition date. The Debtor listed Washington Mutual as holding a first mortgage on the Premises in the amount of \$68,000. *See* Schedule D of the Petition. The Bank is listed as holding a second mortgage on the Subject Premises in the amount of \$49,000, identified as unsecured. *See id.* The parties have stipulated that Washington Mutual holds the first mortgage on the Subject Premises and is owed \$66,977.11, and that the Bank holds a second mortgage on the Subject Premises, with a balance of \$49,884.80, as of the petition date.

According to the Debtor’s plan, she proposes to avoid the lien of the Bank based on her contention that the value of the Subject Premises is less than the amount owed on the first mortgage. It was the Bank’s position, at the time it filed its objection to the Debtor’s plan, that the Subject Premises had a market value of \$123,000. *See* Bank’s Objection at ¶ 7.

The Subject Premises consist of a one story ranch style home on approximately one acre of land, built between 43 and 54 years ago. *See* Debtor’s Exhibit 1 and the Bank’s Exhibit B, respectively. The house contains between 1,760 and 1,800 square feet of gross living area and contains three bedrooms and one bathroom. The house is situated in a rural community on a high traffic roadway, set back from the road and bordered on one side by a farm and on the other by a mobile home or “trailer.” Although located directly across from Oneida Lake, the Debtor testified that the view of the lake from the Subject Premises was obscured by a marina and other

houses. Since purchasing the Subject Premises in March 2001, the Debtor testified that the shower in the bathroom had been replaced with a bathtub and that the interior of the house had been painted. According to the Debtor, the house is heated with oil and there is no central air conditioning.

The Debtor indicated that she purchased the Subject Premises in March 2001 for \$71,000.² She testified that there was no evidence of a water problem in the basement when she purchased the property in 2002, but that it appeared approximately a year later. The Debtor testified that she had not noticed that a portion of the roof sagged when she purchased the house. However, Arsenault testified that he had been aware of it when the Subject Premises were sold in 2001, and that he had taken that factor, as well as the damp basement, into consideration when he described the Subject Premises as “below average to average” in his appraisal, which was dated September 1, 2004.³

Robert Gerbin (“Gerbin”), the Debtor’s appraiser, testified that he had not noticed any dampness in the basement when he had conducted his appraisal in December 2003. He testified that there were signs inside of the house that the roof was leaking, and that it appeared that the

² Joel T. Arsenault (“Arsenault”), the appraiser hired by the Bank, testified that he had brokered the sale of the Subject Premises in 2001 and had been inside the house a dozen different times. At the evidentiary hearing, the Debtor’s counsel questioned whether Arsenault should have disclosed his role in the prior sale in his appraisal. In researching the issue, the Court notes that Title 19 of the Official Compilation of Codes, Rules and Regulations of the State of New York, Part 1106. “Uniform Standards of Professional Appraisal Practice” was repealed in January 2002 and apparently was not replaced with any new rules or regulations.

³ Arsenault testified that Pamela Cox (“Cox”), who had assisted with approximately 300 appraisals since joining Arsenault Appraisals Associates three years earlier, had inspected the interior of the Subject Premises, and he had inspected the exterior. According to the Debtor, Cox had also taken measurements of the outside of the house.

house might need a new roof. He rated the condition of the Subject Premises as “average.”

Arsenault chose three comparables located within 5-8 miles of the Subject Premises, two in Canastota, New York, and one in Chittenango, New York.⁴ See Bank’s Exhibit B. The two in Canastota (“A-1” and “A-2”) had been sold in March 2004 for \$79,900 and \$73,000 respectively. The property located in Chittenango (“A-3”) had been sold in May 2004 for \$83,210. All three comparables were located in a suburban setting; all were between 48 and 53 years in age; and all three were ranches. A-1 was rated as being below average to average; A-2 was rated as average, and A-3 was rated as average to above average.

Arsenault made a downward adjustment of \$3,796 to the selling price of A-1 to account for the fact that the seller had paid points in connection with that sale in March 2004. A-1 was located on .36 acres for which Arsenault made an upward adjustment of \$500. He also made an upward adjustment of \$2,900 based on the fact that the gross living area of the Subject Premises was approximately 290 square feet more than A-1. Arsenault made a downward adjustment of \$500 to account for the fact that A-1 had 1 ½ baths, as compared to the Subject Premises, which had only a single bathroom. There was also an upward adjustment of \$1,000 to A-1 to account for the fact that the Subject Premises had a two car garage, whereas A-1 had only a single car garage. Arsenault made a \$500 upward adjustment to A-1 under the mistaken belief that the Subject Premises had central air conditioning. With gross adjustments of 14.0% and net adjustments of 3.3% (Net adjustment = \$2,605), Arsenault estimated the adjusted sale price of A-1 to be \$82,500.

⁴ Both appraisers acknowledged the appropriateness of using comparables in towns other than that in which the Subject Premises were located, particularly in rural communities in which it is usually more difficult to locate appropriate comparables.

A-2 was located on .24 acres for which Arsenault made an upward adjustment of \$800. He also made an upward adjustment of \$6,900 based on the fact that the gross living area of the Subject Premises was approximately 690 square feet more than A-2. There was also a downward adjustment of \$500 to A-2 to account for the fact that the Subject Premises had a two car garage, whereas A-2 had only a single car garage/carport. Arsenault made a \$500 upward adjustment to A-2 under the mistaken belief that the Subject Premises had central air conditioning. Arsenault made upward adjustments to A-2 of \$1,000 and \$1,500 to account for the fact that the Subject Premises had an enclosed porch and fireplace, which A-2 did not. In addition, Arsenault made a downward adjustment of \$3,000 to account for the “average” condition of A-2, when compared with the Subject Premises, which he had found to be “below average to average.” With gross adjustments of 19.5% and net adjustments of 9.9% (Net adjustment = \$7,200), Arsenault estimated the adjusted sale price of A-2 to be \$80,200.

A-3 was located on .19 acres for which Arsenault made an upward adjustment of \$800. He made an upward adjustment of \$4,900 based on the fact that the gross living area of the Subject Premises was approximately 490 square feet more than A-3. There was also an upward adjustment of \$3,000 to A-3 to account for the fact that the Subject Premises had a two car garage, whereas A-3 had no garage. Arsenault made a \$500 upward adjustment to A-3 under the mistaken belief that the Subject Premises had central air conditioning. He also made an adjustment downward of \$500 to account for the fact that A-3 had a partially fenced yard and another \$500 for the fact that A-3 had a deck/porch and two fireplaces. In addition, Arsenault made a downward adjustment of \$5,000 to account for the “average to above average” condition of A-3, when compared with the Subject Premises, which he had found to be “below average to

average.” With gross adjustments of 27.5.0% and net adjustments of -3.0% (Net adjustment = - \$2,510), Arsenault estimated the adjusted sale price of A-3 to be \$80,700.

It was Arsenault’s testimony that he had made no adjustment for the fact that his three comparables were located in a residential setting, whereas the Subject Premises were located in a rural setting, albeit on a busy road. He testified that, in his opinion, the fact that the Subject Premises had a view of Oneida Lake and were located in close proximity to the lake⁵ offset the fact that they were located on a busy road. He concluded that the fair market value of the Subject Premises was \$81,000 as of September 1, 2004.

Gerbin chose three comparables located within 7.5 miles of the Subject Premises, two in Canastota, New York, and one in Lenox, New York. *See* Debtor’s Exhibit 1. One of the two in Canastota (“G-1”) had been sold in May 2003 for \$68,000 and the other (“G-2”) in August 2003 for \$73,000. The property located in Lenox (“G-3”) had been sold in November 2003 for \$68,820. The latter two were located on a state highway known as the “Seneca Turnpike.”⁶ All were between 45 and 50 years in age, and all three were ranches. Gerbin rated all of the properties, including the Subject Premises, as being in “average” condition. He made downward adjustments of \$3,500 to the three comparables with respect to location on the basis that he felt that their location was superior to that of the Subject Premises. He based this view on the

⁵ The Debtor testified that the closest public beach on Oneida Lake was approximately fifteen minutes away from the Subject Premises.

⁶ When questioned by the Court, Gerbin acknowledged that Seneca Turnpike, on which G-2 and G-3 were located, was a more heavily traveled road than that on which the Subject Premises was located. He justified his use of the two comparables by indicating that they had better neighbors than that of the Subject Premises and had other amenities, including access to public sewers, which made them more “superior” to the Subject Premises.

increased traffic in the summer because of the close proximity of the Subject Premises to the marina, as well as on the condition of the neighbor's property.⁷ G-1 was located on .73 acres for which Gerbin made an upward adjustment of \$1,000. He made no adjustment for the amount of gross living area of G-1, as compared to that of the Subject Premises (1,711 square feet vs. 1,800 square feet); however, he did make a downward adjustment of \$1,500 to G-1 due to the fact that it had 1.5 baths, as compared with the single bath at the Subject Premises. There was also an upward adjustment of \$2,000 to G-1 to account for the fact that the Subject Premises had a two car garage, whereas G-1 had only a single car garage. Gerbin also made a downward adjustment of \$2,000 to account for the "View" and the fact that it was not on a main road, as was the Subject Premises. He also made a \$3,000 downward adjustment to account for the fact that G-1 had "public utilities," whereas the Subject Premises had a septic system.⁸ With gross adjustments of 19.1.0% and net adjustments of -10.3% (Net adjustment = -\$7,000), Gerbin estimated the adjusted sale price of G-1 to be \$61,000.

Arsenault testified in rebuttal that G-1 had been sold in 1999 or 2000 for \$95,000. His office had listed G-1 for sale on behalf of the owner in May 2002 for \$107,000. In July 2002 the price was reduced to \$95,000 as a result of the threat of foreclosure. In October 2002 it had been withdrawn from the market because a foreclosure proceeding had been commenced. Ultimately,

⁷ The Debtor testified that the trailer can be seen from her house and that it was not in particularly good condition and the lawn was not maintained very well.

⁸ Arsenault testified that he had not made any adjustment for the fact that the Subject Premises had a septic system. He did not believe that the fact that a property had a septic system, rather than being connected to public sewers, had an impact on the value as long as the septic system worked properly. According to Arsenault, the quality of the water, e.g. whether it was hard or contained sulfur, might have some impact on value.

G-1 was sold for \$68,000 in what was described as a “corporate sale” by means of multiple listing. Arsenault testified that he would not have used it as a comparable. Gerbin justified his use of it as a comparable, indicating that it had been sold through multiple listing, rather than at an auction sale by a referee “on the court’s steps.”

G-2 was located on .24 acres for which Gerbin made an upward adjustment of \$2,000. Gerbin made a downward adjustment of \$5,000 to account for the fact that he considered G-2 to be in average to good condition, as compared to the Subject Premises, which he considered to be in average condition. He made an upward adjustment of \$5,500 based on the fact that the gross living area of the Subject Premises was approximately 550 square feet more than G-2. Gerbin made downward adjustments of \$500 and \$1,800 to account for the fact that G-2 had a full walk-out basement which contained a family room and half bath. He also made a downward adjustment for the fact that G-2 had central air conditioning, which the Subject Premises did not. Gerbin made upward adjustments of \$3,500 and \$1,500 to account for the fact that G-2 had a carport, not a garage, and did not have a fireplace. He also made a \$3,000 downward adjustment to account for the fact that G-2 had “public utilities,” whereas the Subject Premises had a septic system. With gross adjustments of 38.10% and net adjustments of -3.8% (Net adjustment = -\$2,800), Gerbin estimated the adjusted sale price of G-2 to be \$70,200.

G-3 was located on .57 acres for which Gerbin made an upward adjustment of \$1,500. Gerbin also made a downward adjustment of \$5,000 to account for the fact that he considered G-3 to be in average to good condition, as compared to the Subject Premises, which he considered to be in average condition. He made an upward adjustment of \$8,000 based on the fact that the gross living area of the Subject Premises was approximately 800 square feet more than G-3. He

did not make any adjustment for the fact that G-3 only had two bedrooms.⁹ Gerbin made an upward adjustment of \$2,000 to account for the fact that G-3 only had a single car garage. With gross adjustments of 29.1% and net adjustments of 4.4% (Net adjustment = \$3,000), Gerbin estimated the adjusted sale price of G-3 to be \$71,820.

Arsenault testified that there had been a 4-6% annual appreciation in real property since 2000 for most residential properties. Gerbin agreed that the prices of residential real property had increased in the last 3-4 years. When asked to explain the difference between his estimate of \$66,000 as the fair market value of the Subject Premises and the fact that they had been sold in 2002 for \$71,000, Gerbin responded by suggesting the possibility that the Debtor had not been aware of the problems with the roof and the basement and might have paid too much for the property.

DISCUSSION

It has long been recognized that valuation of assets is “not an exact science” and the courts have wide latitude in determining value. A court is not bound by values determined by appraisals but rather may form its own opinion as to the value of the subject property after consideration of the appraisers’ testimony and their appraisals.

In re Richards, Case No. 97-14798, 1999 WL 14680 at *7 (Bankr. E.D. Pa. Jan. 12, 1999).

Each party has presented testimony by a residential appraiser concerning the value of the Subject Premises. Both experts used the sales comparison method in arriving at their estimated

⁹ Arsenault testified that, in addition to adjusting for the overall amount of living area, he would have made an additional upward adjustment of \$1,000 to account for the fact that the Subject Premises had one more bedroom than G-3.

value of the Subject Premises. As noted above, Gerbin estimated the value of the Subject Premises as of December 23, 2003, to be \$66,000. On the other hand, Arsenault estimated the value of the Subject Premises as of September 1, 2004, to be \$81,000.

The sales comparison method is generally the most reliable method for appraising the value of residential property. *See In re Jones*, Case No. 03-84129, 2004 WL 298612, at *2 (Bankr. C.D. Ill. Feb. 5, 2004), citing Miller and Gallagher, *Residential Real Estate Appraisal* 232 (3d ed. 1998). The most important factors to be considered in determining the validity of the data presented by the appraisers are that

(1) the characteristics of the comparable property are similar to the subject property, (2) the location of the comparable property is relatively close to the subject property, and (3) the date of sale of the comparable property is close to the valuation date. . . . Comparable sales within six months of the valuation date for the subject property are preferred, although in a stable market or where sales activity is low, a period of one to two years is acceptable.”

Jones, 2004 WL 298612 at *2. It is also expected that it will be necessary for an appraiser to make adjustments for differences between the comparable properties and the subject property as no two properties are ever identical. *Id.* at *3. In this regard, greater reliance is to be placed on residential comparables with total adjustments of no more than 25% of the gross selling price or 15% of the adjusted sale price. *See In re Ferman*, Case No. 00-12681, 2001 WL 1755707 at *2 (Bankr. D.N.H. June 4, 2001).

Both appraisers relied on the sales comparison approach in estimating the value of the Subject Premises. All sales of the comparables were within six months of the petition date with the exception of A-3, which occurred approximately seven months after the Debtor filed her Petition. All properties were within eight miles of the Subject Premises and all were ranch style

houses. The adjustments to the comparables may be summarized as follows:

	<u>Net</u>	<u>Gross</u>		<u>Net</u>	<u>Gross</u>
A-1	3.3%	14.0%	G-1	-10.3%	19.1%
A-2	9.9%	19.5%	G-2	-3.8%	38.1%
A-3	-3.0%	27.5%	G-3	4.4%	29.1%

A review of the six comparables, indicates that with respect to A-3, Arsenault made gross adjustments of 27.5% to arrive at an adjusted sale price of \$80,700. Net adjustments were only -3.0%, however. With respect to G-2 and G-3, Gerbin made gross adjustments of 38.1% and 29.1%, respectively, to arrive at adjusted sale prices of \$70,200 and \$71,820. His net adjustments on the two comparables, however, amounted to -3.8% and 4.4%, respectively. While the three gross adjustments are greater than 25%, the net adjustments to all of the comparables fall within an acceptable range for the Court's consideration.

Gerbin estimated a value of \$66,000 for the Subject Premises. In comparing his appraisal with that of Arsenault, the Court notes that in arriving at that figure, he made downward adjustments of \$3,500 to account for what he considered to be the superior location of his comparables, despite the fact that he acknowledged that two of them (G-2 and G-3) were actually located on a road more heavily traveled than that on which the Subject Premises were located. He also made downward adjustments of \$3,000 on G-1 and G-2 to account for the fact that they were on town sewers, whereas the Subject Premises were not.¹⁰ Gerbin made no adjustment for the fact that G-3 had only two bedrooms, rather than the three that the Subject Premises had. On

¹⁰ Arsenault made no adjustments for the fact that the Subject Premises were not on town sewers.

the other hand, Arsenault made an upward adjustment of \$1,000 to account for the fact that one of his comparables (A-3) only had two bedrooms.

As discussed previously, Arsenault expressed concerns about Gerbin's use of G-1, which was a corporate sale in May 2003. According to Arsenault, G-1 had been sold in an arm's length transaction in 1999 or 2000 for \$95,000. In May 2002 it sold for \$107,000. Both appraisers acknowledged that the prices of residential real property had increased over the last 3-4 years. Yet, G-1 sold for \$68,000 approximately a year after the sale in May 2002, a difference of approximately \$40,000. While G-1 was sold not at foreclosure but via multiple listings, the Court finds Arsenault's explanation that corporate sales usually generate a less favorable price because of the corporation's desire to expedite the sale reasonable. Thus, if the Court were to eliminate that particular comparable, the average selling price of G-2 and G-3 is \$71,010.

Arsenault concluded that the value of the Subject Premises was \$81,000. The average of Gerbin's three comparables is \$67,673, yet he estimated a value for the Subject Premises of only \$66,000. Under the circumstances, it is not necessary for the Court to determine the appropriateness of the adjustments made by each appraiser in calculating the value of the Subject Premises. Indeed, it is unnecessary for the Court to make a specific finding regarding exact value of the Subject Premises. If the Bank is secured by any equity at all in the Subject Premises, pursuant to Code § 1322(b)(2), its mortgage on the Debtor's residence may not be modified and its lien avoided. *See Pond v. Farm Specialist Realty (In re Pond)*, 252 F.3d 122, 126 (2d Cir. 2001); *In re Balenton*, Case No. 03-64400, Adv. Pro. No. 03-80501, slip op. at 9 (Bankr. N.D.N.Y. July 26, 2004); *Jones*, 2004 WL 298612 at *1; *In re Scheuer*, 213 B.R. 415, 417-18 (Bankr. N.D.N.Y. 1997).

Whether the Court eliminates G-1 because it was a corporate sale and uses the average of G-2 and G-3 (\$71,010) or uses the average of all three of Gerbin's comparables (\$67,673), it is clear that the value of the Subject Premises exceeds the amount of the first mortgage held by Washington Mutual of \$66,977.11. Accordingly, the Bank's lien attaches to the remaining equity in the Subject Premises, and its mortgage may not be modified pursuant to Code § 1322(b)(2).

Based on the foregoing, it is hereby

ORDERED that the confirmation of the Debtor's plan, filed on October 2, 2003, is denied.

Dated at Utica, New York

this 18th day of March 2005

STEPHEN D. GERLING
Chief U.S. Bankruptcy Judge